Polyflex M Company *and* United Paperworkers International Union, AFL-CIO-CLC. Case 15-CA-7103

March 23, 1982

ORDER DENYING MOTION FOR RECONSIDERATION

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On September 30, 1981, a three-member panel of the National Labor Relations Board issued a Supplemental Decision and Order in the above-entitled proceeding,[1] adopting the Administrative Law Judge's recommendation to overrule Respondent's objection to an election. Agreeing with the Administrative Law Judge that the Union had not made statements in the course of the election campaign in violation of *N.L.R.B.* v. *Savair Manufacturing Co.*,[2] the Board adopted the Administrative Law Judge's recommendation to affirm its earlier Order,[3] which, *inter alia*, had ordered Respondent to bargain, upon request, with the Union. On October 19, 1981, Respondent filed a motion for reconsideration of that Supplemental Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

For the following reasons, we deny the motion for reconsideration and reaffirm our earlier finding that Respondent's refusal to bargain with the Union violates Section 8(a)(5) and (1) of the Act.

As background to our decision it is necessary to chronicle at some length the history of this proceeding. In August 1978, the Charging Party Union won a representation election at Respondent's Summit, Mississippi, facility. Thereafter, Respondent filed objections to the election alleging, *inter alia*, that the Union had engaged in impermissible campaign statements in violation of *Savair, supra*. In that regard, according to the Regional Director, Respondent relied on a leaflet distributed by the Union during the campaign which stated that "There will not be any intiation [sic] fee or any other fee to join the union." Respondent also relied on an affidavit of an employee detailing certain comments allegedly made by Union Representative Herman Merritt at the first employee meeting held by the Union in May 1978. The Regional Director concluded, however, that Respondent had presented no evidence to warrant finding that the Union had conditioned a waiver of initiation fees on employees' signing cards or supporting the Union. Accordingly, he overruled the objection and certified the Union. Respondent thereafter requested review of that decision. In its request for review, it confined itself only to events at the first union meeting in May 27, 1978, and argued that the employee affidavit, referred to above, was susceptible to an interpretation that Merritt, in fact, had made objectionable statements at that meeting. It argued that the affidavit raised substantial and material issues warranting a hearing. The Board, however, denied the request for review.

Subsequently, Respondent refused to bargain with the Union and, upon a complaint and a Motion for Summary Judgment filed by the General Counsel, the Board, in March 1979, found that Respondent's continuing refusal to bargain with the Union violated Section 8(a)(5) and (1) of the Act, and ordered it to bargain with the Union.[4] Thereafter, the Board sought enforcement of its Order. In July 1980, the Fifth Circuit Court of Appeals denied enforcement and instead remanded the case for an evidentiary hearing on Respondent's *Savair* objection.[5] As evidence supporting Respondent's objection, the court made reference only to the employee affidavit discussed above which, as noted, described events only at the May 27, 1978, meeting. The court found the statements in the affidavit susceptible to varying interpretations which indicated that Merritt might have made improper *Savair* statements. The court stated that:

> Because isolated statements violative of the *Savair* rule can be neutralized by explanation or clarification by the Union, *Rounsaville of Tampa, Inc.*, 224 NLRB 455 (1976), it is at least possible that the quoted portions of the affidavit are accurate and yet no *Savair* violation occurred. On the other hand, the opposite conclusion is also possible.[6]

In these circumstances, the court deemed a hearing necessary on the *Savair* objection to "determine what statements were made and what objective interpretation is warranted by the statements when taken as a whole."

The hearing mandated by the court was held before Administrative Law Judge J. Pargen Robertson in March 1981 and the Administrative Law Judge issued his Decision in April 1981. He recommended that Respondent's *Savair* objection be overruled and that the Board reaffirm its earlier finding that Respondent's refusal to bargain was

[1] 258 NLRB 806.
[2] 414 U.S. 270 (1973).
[3] 240 NLRB 1153 (1979).
[4] See fn. 3, *supra*.
[5] 622 F.2d 128.
[6] 622 F.2d at 131.

violative of the Act. In so doing, he analyzed the testimony of the three witnesses concerning the comments made by Union Representative Merritt at the May 27 meeting. The Administrative Law Judge credited the testimony of employee Ella Brown over that of Merritt and employee Willie Tobias and found that Brown's testimony indicated that Merritt had made no *Savair* proscribed statements at the May 27 meeting.[7] Based on his analysis of Merritt's statements on May 27, as well as the Union's election week leaflet,[8] the Administrative Law Judge concluded that the *Savair* rule was not violated in the Union's election campaign. Upon exception to this Decision, the Board, on September 30, 1981, issued its Supplemental Decision and Order[9] in which it adopted the Administrative Law Judge's conclusion and reaffirmed its earlier decision finding that Respondent's refusal to bargain was in violation of Section 8(a)(5) and (1) of the Act.

Thereafter, Respondent filed the instant motion for reconsideration. It now claims that, based on the testimony of Willie Tobias, described below, the Board should find that Merritt engaged in impermissible *Savair* statements. Specifically, it notes that Ella Brown, whom the Administrative Law Judge credited, gave testimony only about Merritt's comments at the May 27 meeting. Respondent now argues that there were other meetings conducted by Merritt that Brown did not attend. However, it asserts that Tobias did attend these other meetings and that his testimony concerning what Merritt said at the other meetings, which it alleges was uncontradicted, demonstrates that Merritt made impermissible statements at these later meetings which warrant setting aside the election.

We reject Respondent's assertions. First, we are not satisfied that Tobias' testimony is uncontradicted. Thus, we note that Union Representative Merritt's testimony, at the least, indicates that at another meeting subsequent to the May 27 meeting he may have again discussed the Union's initiation fee policy. Hence, there are two accounts in the record of what Merritt said at later meetings and we are not at liberty to choose one account over the other. Second, and contrary to Respondent, we do not think it can be said that the Administrative Law Judge credited Tobias' account of those later meetings over Merritt's account. The Administrative Law Judge's credibility findings speak only, and precisely, of the comments Merritt allegedly made at the May 27 meeting, and indeed his Decision makes no reference to subsequent meetings. However, we think that the need for a remand to the Administrative Law Judge for further credibility resolutions concerning Merritt's comments at subsequent meetings is unnecessary. We so conclude because we find, assuming *arguendo* that Tobias' testimony establishes that Merritt made any arguably ambiguous *Savair* statements at employee meetings after the May 27 meeting, the Union's clearly permissible initiation fee policy was adequately explained to the unit employees by the leaflet that the Union mailed to the employees shortly before the election. That leaflet, sent by Merritt to all the unit employees in the week prior to the election, clearly and unequivocally stated, "There will not be any intiation [sic] fee or any other fee to join the union." As the Board has noted, "even though statements made during the course of an election campaign may have been violative of the *Savair* standards, if viewed in isolation, such statements will not cause the election to be set aside where all of the circumstances indicate that the employees were unambiguously informed that the initiation fees were waived in a manner consistent with *Savair*."[10] We think such a situation exists here. We have already affirmed a finding that there were no impermissible statements made by Merritt at the May 27 meeting. Assuming *arguendo* that Tobias' testimony about subsequent meetings indicates that Merritt made ambiguous statements thereafter,[11] we are satisfied that any ambiguous statements were sufficiently clarified. As the circuit court noted in its earlier order of remand, "isolated statements violative of the *Savair* rule can be neutralized by explanation or clarification by the Union." We conclude that that is the situation here and we reaffirm our earlier Order that Respondent

[7] We note that it was Brown's affidavit that Respondent had relied on in the earlier representation proceeding in arguing that Merritt had, in fact, made objectionable statements at the May 27 meeting.

[8] This leaflet was the document referred to above by the Regional Director in his original decision on the objections.

[9] See fn. 1, *supra*.

[10] *Firestone Steel Products Company, a Division of Firestone Tire and Rubber Company*, 235 NLRB 548, 550 (1978).

[11] Tobias' testimony itself is not clear on that point. Respondent relies on that portion of Tobias' testimony in which he indicated that "as best [he could] remember," Merritt told the employees that dues were waived until the local was "organized and chartered," and that the local would be organized "once the union was voted in and everything." Hence, Respondent argues that a "reasonable interpretation" of this statement was that an employee had to join the Union before the election to avoid the initiation fee. At an earlier part of his testimony, however, Tobias indicated that Merritt had *not* said that only those employees who joined the Union before the election would not have to pay the initiation fee. In our earlier Supplemental Decision (see 258 NLRB 806 at fn. 5), we indicated that, contrary to the Administrative Law Judge's finding, Tobias *had* given testimony reflecting that Merritt had tied initiation fees to the Union's victory in the election. We were not there, however, making a credibility finding but simply stating the fact that a portion of Tobias' testimony did reflect that such a statement was made. A portion of that testimony, as noted, reflects the opposite, also.

bargain with the Union, and we deny Respondent's motion for reconsideration of that Order.[12]

[12] We are aware that the leaflet we are relying on to find that the Union sufficiently clarified any ambiguous *Savair* statement is the same leaflet referred to by the Regional Director in his original decision in the underlying representation proceeding. However, while the Regional Director appeared to have relied on that document to find that the Union, in fact, had made no impermissible *Savair* statements, in the face of an employee affidavit to the contrary, we rely on the document only as a sufficient clarification of any possible earlier ambiguous statement concerning *Savair*.

We have fully considered the merits of Respondent's claim that Tobias' testimony establishes that Merritt made impermissible *Savair* statements, in spite of the fact that throughout this proceeding Respondent relied only on the affidavit of Ella Brown in urging that the election be set aside. In this regard, we again reject as lacking in merit Respondent's argument that the Board denied it due process by considering its objection in the context of an unfair labor practice proceeding. See 258 NLRB 806, *supra*, at fn. 4, and cases cited therein.